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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76–1143

RAY MARSHALL,
SECRETARY OF LABOR, *et al.*,

Appellants,

v.

BARLOW'S INC.

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS AMICUS CURIAE

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This brief *amicus curiae* is filed in support of the position of the appellee by the National Federation of Independent Business with the consent of the parties, as provided by Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus National Federation of Independent Business (NFIB) is a voluntary nonprofit membership association whose purpose is to promote and advocate the interests of small business. Its 525,000 members include over 200,000 retailers as well as a variety of manufacturers, wholesalers and service businesses. It has by far the largest individual membership of any business organization in the United States and is the leading representative for small and independent businesses in each of the fifty states.

The membership of NFIB has a direct interest in the Occupational Safety and Health Administration (OSHA) enforcement procedures as framed by the issued in *Barlow's Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977). NFIB businesses are small; only five percent have more than 40 employees. Many members operate their businesses out of their homes. Nearly all members are subject to the Occupational Safety and Health Act of 1970, including the attendant warrantless searches which are in issue in this action.

OSHA has calculated that businesses having 25 or fewer employees constitute only 30 percent of all people employed, but constitute 90 percent of the five million businesses over which OSHA and correspondent state agencies exercise regulatory authority.[1] It is clear that small businesses in particular bear a disproportionate burden of the OSHA regulatory procedures. And to the extent that such procedures are constitutionally impermissible, small businesses suffer a serious incursion on their rights.

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[1]An extensive discussion of the impact of OSHA on small business is found in a policy paper prepared by the OSHA Policy Analysis Staff. See *Occupational Safety and Health Administration's Impact on Small Business*, United States Department of Labor (July, 1976).

Thus it is absolutely relevant that NFIB, a small business spokesman, participate in the judicial debate concerning OSHA warrantless searches. Much Federal regulation has been characterized by broadly stated goals followed by tortured and often irrational implementation of the regulatory scheme. Whatever the lofty intentions of the OSHA legislation, it is clear that its implementation in the form of warrantless on-site inspections is a tremendous burden on small businesses. Since such a procedure is neither necessary to the proper pursuit of OSHA legislative goals, nor, more importantly, founded on sound constitutional grounds, the National Federation of Independent Business is strongly interested in the affirmation of the decision on appeal.

SUMMARY OF ARGUMENT

The Occupational Safety and Health Act of 1970 (OSHA) and regulations issued under its authority have authorized and established a procedure for federal inspection of workplaces under which inspections of a workplace can be mandated without the inspector obtaining a search warrant. This law, as it is enforced without the requirement of a warrant for a challenged on-site inspection, violates the Fourth Amendment proscription against warrantless searches and is therefore unconstitutional as applied.

The searches in issue are administrative inspections of commercial establishments. This Court has specifically applied the Fourth Amendment warrant requirement to administrative searches by federal and local officials. Business and commercial establishments are clearly entitled to Fourth Amendment protections. The Court has required warrants to be obtained in several situations involving enforcement of laws protecting the public health and welfare. The Court has found warrants not to be required in governmental inspections related to highly regulated commodities, such as firearms and alcohol, where the owner of such a business has effectively chosen to submit his

property to the attendant regulations. OSHA inspections are subject to Fourth Amendment protections as they apply to a broad segment of businesses which neither share a prior history of extensive governmental regulation nor have consented to deal in a particular commodity or activity which is highly supervised.

Considerations of public policy support the ultimate goal of OSHA to reduce worker safety and health problems but cannot justify the warrantless procedure here in issue. The goals of OSHA will not be undermined by affirming the unconstitutionality of such warrantless searches. Warrantless on-site inspections are only one of several methods OSHA utilizes to discover and remedy workplace dangers. Furthermore, the on-site inspection procedure is questionably effective in its performance in detecting serious violations, and in its ability to affect the serious environmental hazards or the idiosyncratic behavioral problems which ultimately have the most impact on workplace safety and health. Finally an affirmation that the OSHA inspections must be based on a valid search warrant would no doubt practially affect only a small number of the thousands of inspections OSHA performs each year. There is no reason to suspect that employers would demand a warrant from each and every inspector. OSHA will not be deterred from its responsibility to improve the safety of the workplace by being required to pass constitutional muster with its random inspection procedure.

ARGUMENT

I. JUSTIFICATIONS FOR WARRANTLESS SEARCHES PURSUANT TO THE OCCUPATIONAL SAFETY AND HEALTH ACT, 29 USC 657(a), ARE INSUFFICIENT TO OVERRIDE THE GUARANTEE OF FOURTH AMENDMENT RIGHTS.

A. THIS COURT HAS HELD ADMINISTRATIVE SEARCHES OF COMMERCIAL ENTERPRISES SUBJECT TO THE WARRANT REQUIREMENTS OF THE FOURTH AMENDMENT.

This case involves the constitutional validity of searches of business establishments pursuant to the Occupational Safety and Health Act, 29 USC 651 et seq. (1970). The Act authorizes agents of the Department of Labor:

> (1) to enter without delay and at reasonable times any factory, plant establishment, construction site, or other area, workplace or environment where work is performed by an employee of or employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee." 29 U.S.C. 657(a).

This section has been construed by the Department of Labor to authorize an exception to the Fourth Amendment protection against warrantless intrusions and searches.

This Court in the landmark decision of *Camara v. Municipal Court*, 387 U.S. 523 (1967), upheld the right to insist that San Francisco Housing Authority inspectors secure a warrant prior to inspection. The California statute bore a striking resemblance to the Occupational Safety and Health Act (hereinafter referred to as OSHA) in that it required that credentials be presented and that inspections be at reasonable times and done in a reasonable manner. The Court reasoned that protection from

abuse in criminal searches should be extended to cover administrative searches as well *Id.* at 528. The Court did not go so far as to require probable cause to believe violations existed but did require a warrant for administrative searches of private property.

While the *Camara* case dealt with the inspection of private housing under a municipal housing code, the companion case of *See v. City of Seattle*, 387 U.S. 541 (1967), considered the constitutionality of routine, periodic fire inspections of commercial establishments. The principal impact of *See* was to establish that business establishments *per se* are no more susceptible to unconstitutional searches than are private dwellings. In considering whether an exception to the Fourth Amendment warrant requirement was justified, the Court used a reasonableness standard in equating the inspections to an administrative subpoena of corporate records. The Court noted that when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires "that the subpoena be sufficiently limited in scope, relative in purpose, and specific in directives so that compliance will not be unreasonably burdensome" (387 U.S. at 544). The Court found those same conditions equally applicable to the inspection in *See* and found that the warrant procedure was the appropriate mechanism to ensure that proper standards were applied in the search. The Court reserved decision on the problems of "licensing programs" which require inspections, stating that they were to be resolved on a case by case basis under the general Fourth Amendment standard of reasonableness.

B. THIS COURT HAS CAREFULLY DELINEATED SEVERAL EXCEPTIONS TO THIS RULE ON PUBLIC POLICY GROUNDS.

The first creation of an exception to the Fourth Amendment rule came in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). The Court in *Colonnade* encountered a

warrantless inspection of the business premises of a liquor licensee by agents of the Internal Revenue Service pursuant to statute. In that instance the Court again upheld the idea that a warrant is generally necessary as a prerequisite to inspection. However, it distinguished *Colonnade* from *Camara* in upholding the Service's right to inspect without a warrant because the Court found several differences between *Colonnade* and *Camara* and the case at bar.

First, Congress had exercised broad powers in regulating the liquor business so as to counter various abuses. The use of this power in such a narrow commercial area was justified by the obvious public interest in controlling liquor distribution. Second, because liquor had long been subject to strict regulation, because of restraints in the statute on types of inspection and the great possibility for illegal activity, the search was not found to be unreasonable. *Id.* at 75-77. Third, acceptance of a liquor license was considered a formal consent to the strict regulation and, thereby, the warrantless inspection. *Id.* at 77.

Relying upon the *Colonnade* language, the Court in *United States v. Biswell*, 406 U.S. 311 (1972), expanded the administrative search exception to the Fourth Amendment. The subject of *Biswell* was regulation of firearms traffic, rather than the liquor industry considered by *Colonnade, supra.* The Gun Control Act of 1968 authorized official entry during business hours into "the premises (including places of storage) of any firearms or ammunition... dealer... for the purpose of inspecting or examing (1) any records or documents required to be kept... and (2) any firearms or ammunition kept or stored by such... dealer... at such premises." 18 U.S.C. 923(g). Under this provision, a Federal Treasury agent inspected a licensee's books and storeroom, resulting in the conviction of the licensee for unlawful possession of two sawed-off rifles. Although the agents had received the consent of the owner to inspect the premises, the Court refused to premise its decision upon that basis stating that:

"In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute" (406 U.S. at 315).

The Court noted that Federal regulation of interstate traffic of firearms was not as deeply rooted in history as governmental control of the liquor industry. Despite this, it found such warrantless searches to be justifiable as "of central importance to Federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." *Id.* While establishing the requirement that inspection procedures be specifically provided in the regulatory statute, the Court further specified that the inspection would only be legitimate under the Fourth Amendment if it constituted reasonable official conduct. In contrasting the inspection of firearms with that considered in the *See* case, the Court stated:

> "Here, if inspection is to be effective and serve as a creditable deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspections; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protection afforded by a warrant would be negligible." *Id.* at 316.

One further justification given by the Court in the *Biswell* case was that the inspections posed only limited threats to the dealers' justifiable expectations to privacy. The Court reasoned that a dealer who chose to engage in this "pervasively regulated business and to accept a federal license" does so with the knowledge that his records and equipment would then become subject to effective inspection. Thus, unlike the *Camara* and *See* cases, the dealer would not be left to conjecture regarding the legitimacy of the inspector or the limits of the inspection.

The Court made it clear in the *Almeida - Sanchez v. United States*, 413 U.S. 266 (1973), decision that the *Colonnade* and *Biswell* cases were narrowly carved exceptions to the general rule in *Camara* and *See*. The *Almeida-Sanchez* Court emphasized that the *Colonnade* and *Biswell* factual circumstances justified a particular exception to normal expectations of business privacy.

> "A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessmen in a regulated industry in effect consents to the restrictions placed upon him." 413 U.S. at 271.

Recently, the Court in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), held the warrantless entry into a petitioner's office by IRS agents to be in violation of the Fourth Amendment. The Court found that, unlike the *Biswell* and *Colonnade* cases, "...the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. Rather, the intrusion is claimed to be justified on the ground the petitioner's assets were seizable to satisfy tax assessment" (*Id.* at 354). The Court rejected the contention that the public interest in the collection of taxes justified a warrantless search in noting that both *Biswell, supra*, and *Colonnade, supra*, involved voluntary participation in a highly regulated activity. Also noted was the lack of any specific statutory provision authorizing warrantless inspections, which the Court refused to read into the statute. The *G.M. Leasing Corp.* opinion might suggest a slight liberalization of the Fourth Amendment exception. The decision seems to imply that a warrantless provision can be premised not solely upon licensing or regulation, but also upon the *nature of the particular business itself*. At the very least the *G.M. Leasing Corp.* decision strongly indicates that the Fourth Amendment

exceptions carved out in *Biswell* and *Colonnade* retain their validity, so that a decision from the Supreme Court finding warrants necessary to the OSHA inspections will not reverse those earlier decisions.

C. THE CASE AT BAR DOES NOT COME WITHIN THE NARROW EXCEPTIONS OUTLINED IN *COLONNADE* AND *BISWELL*.

Several recent cases have attempted to hold OSHA inspections alongside the *Colonnade* and *Biswell* exceptions in order to determine whether OSHA will come within their scope.

The District Court for the Southern District of Georgia found the policy behind OSHA and its relationship to warrantless inspections to be sufficiently interdependent to carve out another exception in *Brennan v. Buckeye Industries Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974). The Court held that the limited invasion was necessary for the efficient operation of the OSHA statute and was, therefore, a reasonable intrusion.

The *Buckeye* Court not only followed the reasoning of *Colonnade* and *Biswell* despite radically different circumstances but also expanded the narrow exceptions to include commercial enterprises not closely regulated and not dealing in products of a highly abused nature (such as guns or liquor). *Buckeye* was not a case of an implied consent through a special license.

On the other hand, a Texas decision, *Brennan v. Gibson's Products Inc.*, 407 F.Supp. 154 (F.D. Tex. 1976), held just the opposite under very similar factual circumstances.

Judge Gee, writing for the three judge Court, found that the authority given the Secretary of Labor under the Act did not contemplate warrantless searches. Although recognizing that

Congress could under the Commerce Clause legislate limited invasions of privacy, the Court did not feel the nexus between OSHA's avowed purpose and the warrantless search was close enough to allow abrogation of a fundamental principle of civil liberty. In upholding the statute, Judge Gee interpreted the Congressional mandate as intending that OSHA obtain either valid consent or a warrant before allowing inspection.

In its decision, the Court below noted several causes for adopting reasoning similar to that of the *Gibson* court. First, the Court did not feel that it could force the OSHA search to fit in the *Colonnade* and *Biswell* exceptions:

> "We simply cannot overlook the fact that in *Colonnade* and *Biswell* the court dealt with an 'industry long subject to close supervision and inspection' (*Colonnade*, 397 U.S. at 77), and a 'pervasively regulated business' (*Biswell*, 406 U.S. at 316). We believe that both of those cases fit into the *Camara* categorization of 'certain carefully defined classes of cases.' We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce. 29 U.S.C. 651(a)(3). As such, it applies to a wide variety of over 6,000,000 work places and does not focus on one particular type of business or industry. It cannot be questioned that its broad spectrum of business can be distinguished from the heavily-regulated liquor and firearm industries encountered in *Colonnade* and *Biswell*." *Barlow's Inc. v. Usery*, 424 F. Supp. 437 at 440.

Secondly, it would fly in the face of *Almeida* and more recently, *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), which expressly reaffirmed the holdings in *Camara* and *See. Id.* at 441.

We believe the Court below was entirely correct in noting that:

> "There is one common thread among these cases that requires the result we reach here. In *Camara, See* and *Western Alfalfa, supra,* each was involved with statutory and regulatory schemes aimed at promoting and protecting public health and safety. The warrantless inspections authorized under OSHA likewise seek to promote public health and safety and therefore must be controlled by *Camara* and *See.*" *Barlow's Inc. v. Usery,* 424 F. Supp. 437 at 441.

The OSHA statute is not narrowly drawn and covers nearly every product and workplace imaginable, not specifically delineated and closely regulated businesses. Barlow's is neither federally licensed nor dealing in pervasively regulated commodities. An attempt to force the instant situation into the narrow exceptions outlined by *Biswell* and *Colonnade* would dilute the meaning of *Camara* and *See* to insignificance and severely reduce the personal protection from government intrusion afforded by the Fourth Amendment.

II. IMPLEMENTATION OF THE POLICY GOALS UNDERLYING OSHA DOES NOT REQUIRE CREATION OF ANOTHER EXCEPTION TO THE FOURTH AMENDMENT PROTECTIONS.

The practice of warrantless on-site OSHA inspections not only treads upon employers' reasonable expectations of constitutional protection of their privacy, but also is of questionable efficacy in achieving the improvement of safety and health in the workplace. The goal of safeguarding the working environment is an important national interest. The Congress and the Occupational Safety and Health Administration have established an extensive set of laws, regulations and administrative procedures directed toward that end. But as laudable as is this policy goal, it should not be used to justify a governmental intrusion into a private workplace which has heretofore been relatively independent and free of such burdensome regulation.

The regulation of the workplace is itself not an issue in this matter. To the extent the appellant recites the importance of the Occupational Safety and Health Act, the government is advancing a bootstrap argument for permitting the warrantless inspections. There is simply no existing program of governmental searches or inspections of private property which is analogous in scope or impact to the OSHA on-site inspection program. Warrantless administrative searches have been constitutionally permitted in those narrow areas relative to specific commodities, such as alcohol and firearms. The businessman who enters such fields has done so with the full knowledge that his business premises are open to the appropriate inspection scheme. It is a condition of that business. But the OSHA inspection applies across the gamut of business workplaces, from retail and service to manufacturing. It cannot be argued that the small store owner or businessman has simply by his attempt to earn a living in his own business thereby reduced the expectation that his business premises would be free from governmental intrusion, an intrusion considered by OSHA immune from the usual requirements of constitutionality.

The Occupational Safety and Health Administration relies on a variety of procedures to ascertain whether its standards and regulations are being followed and whether significant safety and health problems exist in a given workplace. The random on-site inspection procedure in issue in this matter is only one means OSHA has utilized to achieve this end. It is considered by the Occupational Safety and Health Administration the lowest

priority inspection procedure in terms of the agency's responding to possible safety violations.[2]

In the incident giving rise to this action the respondent, before refusing the OSHA inspector admittance to his business premises, ensured that the inspector was not seeking entrance as a result of a catastrophe, employee complaints or any alleged poor safety record. Appendix for Appellant at 25. There was no reason for Mr. Barlow to expect an OSHA inspection either because of any special factors calling into question the safety of his operation or because he was involved in a so called "target industry."[3] It is the random inspection procedure to which the respondent objects, because there is no demonstrable reason

[2]See, for instance, a colloquy between the House Appropriations Subcommittee Chairman and the former head of OSHA.

> Mr. FLOOD.
>
> What are your inspection priorities? How do you establish those?
>
> Mr. STENDER. We start with the imminent danger, the catastrophes, we investigate those; we have the target industries, we have the complaints from employees concerning safety. Then we follow with the general inspection, random inspections as we call them.

Department of Labor Related Agencies: Hearings before a Subcommittee of the House Appropriations Comm., 94th Cong., 1st Session (statement of John H. Stender) at 635.

> See also the OSHA staff report on small business. "OSHA performs inspections based on the following order of priorities: imminent danger, fatalities and catastrophic accidents, employee complaints, National Emphasis Programs, and general schedule."

OSHA Impact on Small Business, supra, at 18.

[3]A "target industry" is one in which OSHA attempts to perform a particular number of inspections based on a characteristically high incidence of injury rate in that industry. For the year 1972-1973, OSHA had established the following target industries: roofing, meat products, lumber and wood products, misc. transportation equipment and water transportation service. See *Department of Labor Appropriations Hearings, supra* at 668. Barlow's Inc. was not part of a target industry. Thus for Barlow, it cannot be argued that the governmental interest is weightier because that industry is characteristically more dangerous. Nor can the argument be made that having been explicitly named by OSHA as a special target for random inspections, the expectation of privacy of the air conditioner industry is any less than that of non-target industries.

avabilable to justify OSHA's invasion of his business privacy. Absent any objective evidence available to OSHA, such as a catastrophy report or employee complaint, it cannot be said that a warrantless inspection is justified.

That the present decision on appeal will not frustrate the Congressional intent of OSHA is further demonstrated by a study that the agency itself did of the impact of its inspection policies on small business. The vast majority of OSHA inspections are of "small" businesses (less than 25 employees). Yet OSHA admits that small business is primarily involved in relatively safe industry sectors, as compared with the nationwide industrial safety record. Those industries having the highest incidence rates are primarily populated by larger concerns.[4]

[4]"Businesses having 25 or fewer employees account for only 30 percent of all people employed. Of the almost 5 million business establishments over which federal and state OSHA programs exercise regulatory authority, 4.5 million or 90 percent have 25 or fewer employees. About 19.4 million employees work in these small businesses, while the larger businesses employ about 41.1 million workers.

Almost 80 percent of the small businesses are in the industry sectors having the lowest injury and illness incidence rates, while 60 percent of the large businesses are in those sectors (see Table 1). Only 15 percent of the small businesses are in the sectors having the highest rates, compared to 32 percent of the large businesses."

OSHA Impact on Small Business, supra, at 18.

These study figures suggest that the random inspection program has in fact not been focused on those workplaces which pose the greatest threat to employee health and safety. To insist that the inspections be backed up on demand by constitutionally required warrant procedures is justified by the expectation not only of the small business owner that his premises enjoy normal privacy protections but of the taxpayer that the federal agency responsible for workplace safety would discharge that responsibility in a manner that is administratively efficient and legally sound. The random warrantless inspection program is neither.[5]

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[5]There is considerable uncertainty as to what the record of workplace health has been since the advent of OSHA and to what to attribute any improvement in workplace safety. A recent study by the Library of Congress notes:

> "Both the BLS and NSC indicate that part of the decrease in the injury and fatality rates between 1974 and 1975 can be attributed to a decrease in the general employment rate. Both organizations report that the last people hired are generally the greatest safety risks and, since they are less experienced than workers with more seniority, they frequently contribute to higher injury and fatality rates. Similarly, the last hired are frequently the first fired or laid off in times of employment cutbacks. Therefore, when the same group of people is removed from the employment picture, the injury and fatality rates are expected to decline somewhat, as a result.
>
> The BLS also indicates that part of this decision in fatality and injury rates may be attributed to the disproportionate drop in manufacturing and contract construction employment from 1974 to 1975. Both of these injuries have relatively higher rates of injuries and fatalities than the rest of the private economy."

Benefits and Costs of the Occupational Safety and Health Act: A Review of the Available Evidence; The Library of Congress, January 26, 1977.

In fact there is a growing body of evidence which suggests that the basic procedure of random inspections is not able to detect the major causes of injuries and health hazards in the workplace. Studies done in Idaho, California and Wisconsin, at the request of OSHA, all came to the conclusion that the inspection system now employed by OSHA is, by its very nature, unable to detect the most frequent causes of injury and illness.[6] For example, data was examined on industry wide bases and in Wisconsin showed that the Wisconsin inspection system, which is generally more stringent than even OSHA's, could only control 25% of the accidents in the sample. The remaining 75% were momentary (non-persistent) physical hazards and behavioral problems. The study did not even take into account long term environmental hazards which are unlikely to be detected through routine inspection by OSHA and its correspondent state agencies.

The appellant suggests that imposition of a warrant requirement will be specifically impractical as it will eliminate the possibility of a surprise search of premises before the employer is able to disguise violations. A perusal of OSHA workplace standards reveals lengthy and detailed regulations relating to nearly every imaginable aspect of the workplace. Doubtless a philosophical challenge for the bureaucrat seeking comprehensive regulations, OSHA standards have been a practial challenge for the employer who must first understand the rules

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[6]State of Wisconsin, Dept. of Industry, Labor and Human Relations; *Inspection Effectiveness Report,* September 28, 1971.

State of Idaho, Industrial Commission, Statistics Division; *Preliminary Report for 1973 Fiscal Year Survey of Injury Due to Occupational Accidents or Illnesses.*

California Department of Industrial Relations, Dir. Management Analysis; *Development of Inspection Value Index,* June 30, 1973.

and then implement them.[7] The specter of the employer suddenly disguising his noncompliant shop after refusing entrance to the warrantless OSHA inspector is not plausible. OSHA regulations are so intricate and cover such broad areas that discovery of violations, particularly serious violations, would not likely be avoided by a few days notice and some cosmetic action on the part of the employer. Furthermore, if the notice results in the correction of the problem before the inspection arrives, the goal of the agency is completely served. The imposition of a warrant requirement will only frustrate those inspectors to whom levying a penalty is more important than the underlying goal of improving the workplace.

Finally, the government only suggests that the warrant requirement would create enforcement problems. As pointed out in appellant's brief there is now a procedure within OSHA for an inspector to obtain compulsory process if he is refused admittance by an employer. Brief for Appellant at 8. There is no indication that OSHA inspectors must resort to this procedure with any degree of regularity. There is no showing that hundreds or thousands of inspections have been delayed because of this procedure. This hypothetical argument has no basis. This Court has the discretion to find a warrant required in every inspection where voluntary consent of the employer is not given. It is unlikely that requiring a challenged inspector to obtain a search warrant will severely deter the OSHA inspector forces from pursuing their appointed task.

This Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967), rejected the argument that the efficacy of the San Francisco Code required warrantless inspections stating:

[7]It has been the experience of many member firms of the amicus that not only are they unable to keep up with the complicated flow of regulations from the Occupational Safety and Health Administration, but the OSHA inspectors themselves are often unsure of the interpretation and application of the regulations.

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." *Id.* at 533.

Similarly, if OSHA is to sustain its claim to an exception to the Fourth Amendment, it must show that the Inspection program is accomplishing its governmental purpose and that purpose would be frustrated without those inspections now in question. It is the contention of the National Federation of Independent Business (NFIB) that the OSHA random inspection program is not and cannot efficiently accomplish its avowed goals and that pursuit of workplace safety would not be hampered by a warrant requirement.

CONCLUSION

The random on-site Occupational Safety and Health Act inspection procedure is of questionable administrative efficacy and unquestionably devoid of proper constitutional protections. The national interest in encouraging workplace safety is not dependent upon the warrantless inspection procedure. The three judge district court correctly decided the procedure was unconstitutional. That decision should be affirmed by this Court.

Respectfully submitted,

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